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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOHN MOLKO,

Defendant and Appellant.

C088815

(Super. Ct. Nos. 16CF05884
& 17CF03812)

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant Robert John Molko appeals the imposition of fines and assessments in two criminal cases without an ability to pay hearing. We conclude defendant's reliance on *Dueñas* is without merit and affirm the judgment.

BACKGROUND¹

In case No. 16CF05884, defendant pleaded no contest to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and in case No. 17CF03812, defendant pleaded no contest to being a felon in possession of a firearm (Pen. Code, § 29800)² and admitted an on-bail enhancement allegation (§ 12022.1). In light of those pleas, the trial court also found defendant had violated mandatory supervision in case No. CM041370, a conviction for possession of methamphetamine for sale (Health & Saf. Code, § 11378). The trial court sentenced defendant to serve an aggregate term of six years four months in prison. The trial court re-imposed the previously ordered fines and fees in case No. CM041370. With those fines, the sentence included a \$300 restitution fine (§ 1202.4, subd. (b)), imposition of the mandatory supervision revocation fee in case No. CM041370 (§ 1202.45), a \$40 court operations assessment (§ 1465.8) per conviction, and a \$30 conviction assessment per conviction (Gov. Code, § 70373) in each case. The trial court also imposed a drug analysis fee that, with fees and assessments, amounted to \$195. The trial court declined to impose the drug program fee under Health and Safety Code section 11372.7, and the cost of the supplemental probation report, finding defendant had no ability to pay.

After defendant filed his notice of appeal, defendant made a section 1237.2 motion in the trial court requesting it strike the court operations and conviction assessments and stay the restitution fine pending an ability to pay determination. The trial court denied the motion.

¹ Based on the nature of the claims on appeal, the facts underlying the convictions are not relevant to the resolution of this appeal and therefore, not recounted here.

² Undesignated statutory references are to the Penal Code.

DISCUSSION

Defendant claims that pursuant to the holding in *Dueñas*, *supra*, 30 Cal.App.5th at pages 1168 and 1172, the portion of the trial court order directing him to pay restitution fines, court operations assessments, and criminal conviction assessments should be vacated or stayed pending a hearing on his ability to pay.

In *Dueñas*, the Court of Appeal held that due process prohibits a trial court from imposing court assessments under section 1465.8 and Government Code section 70373, and requires the trial court to stay execution of any restitution fines unless it conducts an ability to pay hearing and ascertains the defendant's ability to pay those assessments and fines. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) To support this conclusion, *Dueñas* relied on two lines of due process precedent. First, it cited authorities addressing access to courts and waiving court costs for indigent civil litigants. Second, it relied on due process and equal protection authorities that prohibit incarceration based on a defendant's indigence and inability to pay a fine or fee. (*Id.* at pp. 1165-1166, 1168.) The court also concluded that imposing costs on indigent defendants "blamelessly" unable to pay them transformed a "funding mechanism for the courts into additional punishment." (*Id.* at p. 1168.)

People v. Hicks (2019) 40 Cal.App.5th 320, review granted November 26, 2019, S258946, rejected the reasoning of *Dueñas* under both lines of due process authority. *Hicks* observed that imposition of fees after a determination of guilt does not deny a criminal defendant's access to the courts and does not interfere with a defendant's right to present a defense or challenge a trial court's rulings on appeal. (*Hicks*, at p. 326.) Further, imposition of fees, without more, does not result in incarceration for nonpayment of fines and fees due to indigence; thus, it does not infringe on a fundamental liberty interest. (*Ibid.*)

We find the reasoning in *Hicks* sounder and more persuasive than *Dueñas*. Our Supreme Court is now poised to resolve this question, having granted review in *People v.*

Kopp (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, that agreed with the court’s conclusion in *Dueñas* that due process requires the trial court to conduct an ability to pay hearing and ascertain a defendant’s ability to pay before it imposes court facilities and court operations assessments under section 1465.8 and Government Code section 70373, but not restitution fines under section 1202.4. (*Kopp*, at pp. 95-96.)

In the meantime, we join several other courts in concluding the principles of due process do not require determination of a defendant’s present ability to pay before imposing the fines and assessments at issue in *Dueñas* and in this proceeding. (*People v. Cota* (2020) 45 Cal.App.5th 786, 794-795; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279; *People v. Hicks*, *supra*, 40 Cal.App.5th at p. 329, rev. granted; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 928.)

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
DUARTE, Acting P. J.

/s/
BUTZ, J.*

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.